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Some Doubts About the Use of Trusts to Avoid the Estate Tax

A popular method to avoid the estate tax is to place property in an inter vivos trust that can only be altered or revoked by someone over whom the settlor has a certain moral suasion. In this Article, Professor Lowndes examines this device against a background of both estate tax and gift tax law. He concludes that recent developments in the gift tax area cast doubt on its efficacy in avoiding the estate tax.

Charles L. B. Lowndes*

The most obvious way to avoid an estate tax is to give away property during your life in order to get it out of your estate at your death. In this connection an interesting question arises as to whether it is possible to transfer property so as to remove it from the transferor's taxable estate without actually parting with control over the property. It is generally assumed that this can be done by means of an inter vivos trust under which one other than the settlor of the trust (but one subject to his moral suasion) is given power to alter or revoke the trust. Thus, if A wishes to give property to B that will not be taxed to A's estate without completely relinquishing the power to recapture the property, he may transfer the property to T in trust for B and empower T to alter or revoke the trust. If A is careful to select a complaisant trustee, he can retain control over the trust property through his influence over the trustee. If A outlives the presumptive period so that the transfer to the trustee cannot be treated as a transfer in contemplation of death,¹ he may escape an estate tax on the trust property on the plea that he did not retain any legally recognized interest in the property. This looks like an admirable way to have your tax cake and eat it too. Avoidance of the estate tax by means of a trust which can be altered or revoked by the trustee, however, calls for very precise planning. There are, moreover, re-

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1. There is a conclusive presumption that a transfer made more than three years before the transferor's death is not in contemplation of death. INT. REV. CODE OF 1954, § 2035(b).

cent developments which cast doubt upon the feasibility of the scheme even if it is precisely planned. Before turning to these doubts it is advisable to examine the device itself. In this connection it will be convenient to talk about the estate tax first and then about the gift tax.

I. ESTATE TAX

Until recently it seemed settled that trust property will not be taxed to the estate of the settlor of the trust if he conferred power upon persons other than himself to alter or revoke the trust. Thus, the regulations provide that the existence of such a power in another will not attract a tax either under section 2038,² which taxes revocable trusts, nor under section 2036,³ which taxes trusts where the settlor retained power to designate the income from, or the possession or enjoyment of, the transferred property during his life. In *Anna Ball Kneeland*,⁴ the first case to raise this problem, a decedent created an inter vivos trust for his wife with remainders over to his children and provided that his wife might revoke the trust. The Board of Tax Appeals held that the trust property was not taxable to the decedent's estate because he had not retained any interest in the trust property. The provisions of the estate tax imposing the tax upon a trust where the settlor has power to alter or revoke the trust⁵ or to designate the income from the trust property⁶ limit the tax to a situation where the settlor must participate in the exercise of the power. Literally, the language of the statute extends only to a situation where the settlor alone or in conjunction with another person may exercise the power; it does not provide for a tax where the power is vested exclusively in one other than the settlor.

The person empowered to revoke the trust in the *Kneeland* case was a beneficiary of the trust. Subsequent cases have held that a trust is not taxable under the estate tax even though the power to alter or revoke the trust is vested in a nonadverse person other than the settlor of the trust.⁷ Moreover, the regulations, which provide that the estate tax does not apply to powers vested in persons other than the settlor of the trust, do not differentiate between adverse and nonadverse holders of the power.⁸

2. Treas. Reg. § 20.2038-1(a)(3) (1958).

3. Treas. Reg. § 20.2036-1(b)(3) (1958).

4. 34 B.T.A. 816 (1936).

5. INT. REV. CODE OF 1954, § 2038.

6. INT. REV. CODE OF 1954, § 2036.

7. *In re Uhl's Estate*, 241 F.2d 867 (7th Cir. 1957); *Commissioner v. Irving Trust Co.*, 147 F.2d 946 (2d Cir. 1945).

8. Treas. Reg. §§ 20.2036-1(b)(3), 2038-1(a)(3) (1958).

Although it has been held that a trust that can be altered or revoked only by one other than the settlor of the trust is not taxable to the settlor's estate, great care must be exercised to make sure that power to affect the enjoyment of the trust is not inadvertently retained by the settlor. If the settlor of a trust has power to alter or revoke the trust, the trust property will be taxable to his estate even though the power can be exercised only in conjunction with a person possessing a substantial adverse interest in the trust.⁹ The suggestion has been made in several cases that the settlor of a trust does not possess power to alter or revoke a trust where the power is vested in a trustee who can exercise the power only with the consent of the settlor.¹⁰ The theory behind this contention is that the power is lodged in the trustee and the settlor has simply a veto over the trustee's exercise of the power. More sophisticated decisions take a more realistic approach and dismiss any distinction between a power that can be exercised by the settlor of a trust with the consent of the trustee and a power that can be exercised by the trustee with the consent of the settlor as a distinction without a difference.¹¹ In both cases the settlor is regarded as having a joint power with the trustee, since the power can only be exercised by the concurrent action of both parties, and regardless of who must formally exercise the power, there is nothing to prevent either party from initiating the exercise by suggesting such action to the other.¹² It seems reasonably certain that a trust that the trustee can alter or revoke will not escape the estate tax if the settlor must consent to the exercise of the power.

9. *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935). There is a minor exception to this rule in the case of a transfer to a trust that can be revoked by the settlor of the trust only with the consent of all of the beneficiaries of the trust. This is regarded as a complete transfer that is not taxable under the estate tax. *Helvering v. Helmholz*, 296 U.S. 93 (1935).

10. See *Estate of Arnold Resch*, 20 T.C. 171 (1953); *Estate of Clayton W. Sherman*, 9 T.C. 594 (1947); cf. *Orrin G. Wood*, 40 B.T.A. 905 (1939) (gift tax).

11. *DuCharme's Estate v. Commissioner*, 164 F.2d 959 (6th Cir. 1947); *Thorpe's Estate v. Commissioner*, 164 F.2d 966 (3d Cir. 1947); *Goldstein's Estate v. United States*, 129 Ct. Cl. 264, 122 F. Supp. 677 (1954).

12. In *DuCharme's Estate v. Commissioner*, 164 F.2d 959, 962 (6th Cir. 1947), the court said:

Petitioner contends, however, that Paragraph 12 did not give the decedent the right, in conjunction with another person, to designate the persons who shall enjoy the property, but that it merely gave the decedent the power to veto a change requested by the wife. The contention is supported by a strict construction of the phraseology of Paragraph 12, but in our opinion places emphasis upon form rather than upon substance. Regardless of who initiates or requests such a change, the consent of both parties is required to make the change effective.

Even though power to alter the beneficial enjoyment of trust property is vested exclusively in the trustee or trustees of a trust, the trustees' powers will be attributed to the settlor if he possesses an unrestricted power to appoint himself a trustee,¹³ and the trust property will be taxable to his estate. If the settlor's power to appoint himself trustee is subject to some contingency beyond his control that has not occurred at his death, the trust property will not be taxed to his estate under section 2038, which taxes revocable trusts, because the contingency prevents the power from being in existence in the settlor at the settlor's death.¹⁴ It is not clear, however, whether such a trust may be taxed under section 2036. Although the regulations have finally submitted to the cases and hold that a contingent power is not taxable under section 2038,¹⁵ they take a different view with regard to the taxation of contingent powers under section 2036,¹⁶ where there does not seem to

As a practical matter, if the settlor desired to make a change and the other party was willing that the change be made, the change could be accomplished under the provisions of Paragraph 12 by having the wife request the change agreed upon, even though it was originally suggested by the settlor.

There is no practical distinction between a power to revoke a trust that may be exercised by the trustee alone and a power to revoke a trust that the trustee can only exercise with the consent of the settlor of the trust. In either case the exercise of the power is ultimately dependent upon the will of the trustee. A power to alter the beneficiaries of a trust that can be exercised by the trustee alone differs from a power to alter the trust that can be exercised by the trustee only with the consent of the settlor of the trust to the extent that the latter power gives the settlor of the trust the power to prevent the trustee from diverting the trust property to someone to whom the settlor does not desire to give the trust property.

13. *Clark v. United States*, 267 F.2d 501 (1st Cir. 1959); *Van Beuren v. McLoughlin*, 262 F.2d 315 (1st Cir. 1958), *cert. denied*, 359 U.S. 991 (1959); *Loughridge's Estate v. Commissioner*, 183 F.2d 294 (10th Cir.), *cert. denied*, 340 U.S. 830 (1950). The trust property will be taxable to the settlor's estate even though he has power to appoint himself one of several co-trustees, since both § 2038 and § 2036 impose a tax where a taxable power is vested in the settlor alone or in the settlor in conjunction with any other person. See *Clark v. United States*, *supra*; *Van Beuren v. McLoughlin*, *supra*.

14. *Jennings v. Smith*, 161 F.2d 74 (2d Cir. 1947); *Helvering v. Tetzlaff*, 141 F.2d 8 (8th Cir. 1944); *Commissioner v. Flanders*, 111 F.2d 117 (2d Cir. 1940); *Day v. Commissioner*, 92 F.2d 179 (3d Cir. 1937); *Tait v. Safe Deposit & Trust Co.*, 74 F.2d 851 (4th Cir. 1935); *Winchell v. United States*, 180 F. Supp. 710 (S.D. Cal. 1960); *Estate of Lena R. Arents*, 34 T.C. 274 (1960), *rev'd on other grounds*, 297 F.2d 894 (2d Cir.), *cert. denied*, 369 U.S. 848 (1962); *Estate of Frederick M. Kasch*, 30 T.C. 102 (1958); *Estate of Cyrus C. Yawkey*, 12 T.C. 1164 (1949); *cf.* *Joseph Goldstein*, 37 T.C. 897 (1962) (gift tax).

15. *Treas. Reg.* §§ 20.2038-1(a)(3), (b) (1958).

16. After stating that power in the settlor of a trust to appoint himself trustee of the trust will not make the trust property taxable to his estate under § 2038 if the settlor "only had the power to appoint himself trustee

be any judicial authority. Section 2036(a)(2) imposes a tax where a decedent during his life transferred property and retained power to designate the income from, or the possession or enjoyment of, the property during his life. According to the regulations, the tax under section 2036(a)(2) applies even though the "exercise of the power was subject to a contingency beyond the decedent's control which did not occur before his death"¹⁷ The distinction made between sections 2038 and 2036 seems to be based on the fact that section 2038 explicitly specifies that a power to alter or revoke a transfer will be taxable under that section, even though it is subject to a precedent giving of notice before it can be exercised or takes effect only upon the expiration of a stated period after the exercise of the power, while there is no corresponding provision under section 2036. Apparently, the Treasury believes that the express reference to certain contingencies, which will not preclude a tax under section 2038, implies that any other contingencies will prevent a tax under that section. On the other hand, the failure to specify any contingencies that will not prevent a tax under section 2036 indicates that contingent powers are taxable under that section. The regulations, in line with the view that a contingent power is not taxable under section 2038, refuse to impute the powers of the trustee to the settlor of the trust for purposes of that section if the settlor's power to appoint himself trustee is subject to a contingency beyond his control which has not occurred at his death.¹⁸ There is an intimation in the regulations, however, that a contingent power to appoint himself trustee will be enough to impute the trustee's powers to the settlor of the trust under section 2036(a)(2),¹⁹ which is consistent with the position taken by the regulations that a contingent power is taxable under section 2036.²⁰ It may be significant, however, that the illustration given by the regulations of a power to appoint himself trustee, which will lead to imputing the trustee's powers to the settlor of a trust under section 2036(a)(2), involves a situa-

under limited conditions which did not exist at the time of his death," § 20.2038-1(a)(3) refers to the last two sentences of paragraph (b) of § 20.2038-1. These sentences, after stating that a contingent power is not taxable under § 2038, refer to § 2036(a)(2) of the Code, which taxes a power to designate the income from, or the possession or enjoyment of, property transferred by the decedent during his life. Section 20.2036-1(b)(3), as the text indicates, provides that the fact that the power to designate income or possession is dependent upon a contingency which has not occurred before the decedent's death does not preclude a tax under § 2036.

17. Treas. Reg. § 20.2036-1(b)(3) (1958).

18. Treas. Reg. § 20.2038-1(a)(3) (1958).

19. See regulation cited note 17 *supra*.

20. Treas. Reg. § 20.2036-1(b)(3) (1958).

tion where "the decedent reserved the *unrestricted* power to remove or discharge a trustee *at any time* and appoint himself as trustee" ²¹ In view of the doubt about what kind of power to appoint himself trustee will make trust property taxable to the estate of the settlor under section 2036(a)(2), it seems obvious that in order to be certain that the trust property will not be taxed, the settlor should not have any power to appoint himself trustee, even a contingent power.

Even though the power to alter or revoke a trust is vested exclusively in the trustee of a trust as far as the language of the trust instrument is concerned, the trust property may be taxed to the estate of the settlor of the trust if the trustee has a discretionary power to pay over the trust property to the settlor and, under the local trust law, creditors of the settlor can compel the trustees to exercise this power in their favor. In *Estate of Edgar M. Uhl*,²² the decedent created an inter vivos trust with directions to distribute 100 dollars a month from the income of the trust to himself. The trustee was given discretion to distribute surplus income to the settlor of the trust or to accumulate it for the remaindermen. At the settlor's death, the Tax Court held that the trust property was taxable to his estate on the theory that under Indiana law his creditors could have reached the trust income that the trustee could have paid to the settlor and the settlor had, therefore, retained the right to the income from the trust during his life, since he could in effect reach this income by incurring debts.²³ The Seventh Circuit reversed the Tax Court's decision in the *Uhl* case,²⁴ but it did not directly dispute its assumption that the settlor of a trust is regarded for tax purposes as retaining any interest in the trust which his creditors can reach. The appellate court denied that under Indiana law the settlor's creditors could have reached the trust property and refused to tax the property to the settlor's estate on the ground that he had parted completely with all interest in the trust property during his life.

The determinative factor in this type of case appears to be the rights of the creditors of the settlor of the trust under the local trust law. If they have the right to reach the trust property, it would appear that this right will be imputed to the settlor and he will be taxed accordingly. The *Restatement of Trusts*, as part of

21. *Ibid.* (Emphasis added).

22. 25 T.C. 22 (1955).

23. In *Alice Spaulding Paolozzi*, 23 T.C. 182 (1954), the Tax Court held that a similar transfer was incomplete and was not taxable under the gift tax, since the transferor could in effect revoke the transfer by incurring debts.

24. *In re Uhl's Estate*, 241 F.2d 867 (7th Cir. 1957).

its antipathy against spendthrift trusts in favor of the settlor of the trust, lays down the flat rule that if a man creates a discretionary trust in his own favor, his creditors can compel the trustee to pay them anything which the trustee could in his discretion pay the settlor of the trust.²⁵ It seems reasonably clear that in a jurisdiction following the *Restatement* rule, it is impossible to remove property from the estate of a settlor by creating a trust under which the trustee has discretion to pay over the trust property to the settlor. If, however, the trust is governed by the law of a jurisdiction which rejects the *Restatement* rule, it is apparently possible to avoid an estate tax by such a trust.²⁶

If the trustee's power to pay over the trust property to the set-

25. RESTATEMENT (SECOND), TRUSTS § 156(2) (1959), provides: "Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit."

26. Strangely enough, with the exception of the *Uhl* case, there does not seem to have been any sustained attempt to tax a discretionary trust to the estate of the settlor of the trust upon the theory that his creditors could reach the trust property. In *Alice Spaulding Paolozzi*, 23 T.C. 182 (1954), the Tax Court held that a transfer to a trust under which the trustees were given discretion to pay over the trust property to the settlor of the trust was an incomplete transfer that was not taxable under the gift tax because the creditors of the grantor could reach whatever the trustees were empowered to pay the grantor. Inferentially, the transfer in the *Paolozzi* case would have been taxable under the estate tax. In *Herzog v. Commissioner*, 116 F.2d 591 (2d Cir. 1941), the Second Circuit held that a transfer to a trust under which the trustees were given discretion to pay over the trust property to the settlor or his wife was a complete transfer which was taxable under the gift tax. The court refused to follow the *Restatement*, *op. cit. supra* note 25, and hold that the creditors of the settlor could reach the trust property. The court said that the New York law of trusts was not clear upon this point, and in view of this uncertainty, it would accept the conclusion of the Board of Tax Appeals that the settlor's creditors could not reach the trust property. In *Hernstadt v. Hoey*, 47 F. Supp. 874 (S.D. N.Y. 1942), a district court in New York held that a transfer in trust where the settlor's brother and attorney had power to alter or revoke the trust was a complete transfer which was taxable under the gift tax. The court cited the *Herzog* case without discussing the power of the settlor's creditors to reach the trust property under the New York law. *Rheinstrom v. Commissioner*, 105 F.2d 642 (8th Cir. 1939), is a similar case where the court held that a transfer in trust was a complete transfer and taxable gift of the part of the trust property which the trustees had complete discretion to pay to the settlor of the trust. The court again did not discuss the right of the settlor's creditors to reach the trust property. *Commissioner v. Irving Trust Co.*, 147 F.2d 946 (2d Cir. 1945), is one of the few cases in this area that involved the estate tax. The Second Circuit held that trust property that the trustee had complete discretion to return to the settlor of the trust, was not taxable to the settlor's estate because the settlor had not retained any interest in the property. The court did not discuss the rights of the creditors of the settlor to reach the trust property, although it cited the *Herzog* case. This might indicate a feeling that they had no such right.

tlor of the trust is not completely discretionary, but is subject to a definite objective standard under which the settlor has an equitable right to compel the trustee to pay over the trust property to him, the trust property may be taxable to the settlor's estate. In *Blunt v. Kelly*,²⁷ for example, where a decedent transferred property in trust for herself for life with remainders over to her children and gave the trustees power to pay over such principal to her as they deemed proper for her "support, care or benefit," the trust property was held to be taxable to the settlor's estate. Since the trust was created before the statute was amended in 1931 to explicitly tax transfers with a reservation of a life estate, the court did not impose the tax upon this ground. The court held, however, that the decedent had an equitable right to compel the trustees to pay her any principal that she needed for her support, care, or benefit, and the retention of this equitable interest in the trust property made the transfer to the trustees taxable as a transfer taking effect at death. In *Toeller's Estate v. Commissioner*,²⁸ the Seventh Circuit reached a similar conclusion where the decedent transferred property in trust and gave the trustees discretion to pay him any principal necessary for his living expenses. The court said that although the trustees' power was phrased in discretionary terms, the presence of an objective standard under which the settlor could compel payments gave him an equitable right in the trust property, which made the transfer to the trustees taxable as a transfer taking effect at death. In these cases, the full amount of the trust property was taxed to the settlors' estates, since the potential invasion of the trust property was not limited to any specific amount and there was a chance that the entire property might revert to the settlor. In *Bankers Trust Co. v. Higgins*,²⁹ however, where the trustee's power to invade principal in behalf of the settlor of the trust was limited to the amount necessary to bring the trust income payable to the settlor up to 60,000 dollars a year, the court held that the amount taxable to the settlor's estate was limited to the actuarial value of the principal that might be paid over to the settlor in view of his life expectancy and the annual yield of the trust property, since the potential invasion of the trust property in behalf of the settlor could not exceed this amount.

It is difficult to appraise the impact of these cases upon the current law because of the restrictive definition of a transfer taking

27. 131 F.2d 632 (3d Cir. 1942).

28. 165 F.2d 665 (7th Cir. 1948); *accord*, Estate of Ida Rosenwasser, 5 T.C. 1043 (1945).

29. 136 F.2d 477 (2d Cir. 1943).

effect at death under the 1954 Code. Of course, if a man transfers property and retains the income from the property for life as the decedents did in *Blunt v. Kelly*,³⁰ *Toeller's Estate v. Commissioner*,³¹ *Estate of Ida Rosenwasser*,³² and *Bankers Trust Co. v. Higgins*,³³ the trust property is taxable to his estate under section 2036. But suppose that the only interest that the settlor retains in the trust is the power granted to the trustee to pay over to the settlor whatever the trustee deems necessary for the settlor's support; will this make the trust property taxable to the grantor's estate under the 1954 Code? The obvious difficulty with taxing the transfer as a transfer taking effect at death under section 2037 is that this section limits the tax to a case where the decedent's reversionary interest in the transferred property was worth more than five per cent of the value of the property immediately before his death. If the right to be supported from the principal of a trust fund is dependent upon the settlor's other income proving inadequate, how can the right be valued?³⁴ If it is impossible to value the settlor's right to the principal of the trust actuarially, will it be valued at zero so that section 2037 will not apply, or since the decedent's estate cannot prove the value of his reversionary interest, will it be assumed that it is worth more than five per cent of the value of the transferred property so that this requirement of section 2037 will be complied with?

Apart from section 2037, it is possible that a trust where the trustee has power to invade the trust property in behalf of the settlor and this power is controlled by an ascertainable objective standard may be taxed to the estate of the settlor of the trust under sections 2038, 2036, and 2033. Section 2038 imposes a tax where the decedent transferred property and at his death had power, either alone or in conjunction with some other person, to alter the possession or enjoyment of the transferred property. Section 2036 imposes a tax where a decedent during his life transferred property and retained either the possession or enjoyment of the property or the right, either alone or in conjunction with some

30. 131 F.2d 632 (3d Cir. 1942).

31. 165 F.2d 665 (7th Cir. 1948).

32. 5 T.C. 1043 (1945).

33. 136 F.2d 477 (2d Cir. 1943).

34. According to the *Restatement of Trusts*, *op. cit. supra*, note 25, the creditors of a person who establishes a trust for his own support can compel the trustee of the trust to pay over to them whatever the settlor could have demanded for his own support. In this case, however, since the settlor of the trust (unlike the settlor of a discretionary trust) can compel the trustee to pay him whatever he needs for his support, the fact that his creditors can exercise his right against the trustee for their own benefit does not affect the tax situation.

other person, to designate the possession or enjoyment of the property. It is difficult to see how a power to require the trustee to pay to the settlor principal needed for his support can be characterized justly as a power to alter or designate the enjoyment of the trust property. Since the power is a nondiscretionary power, which must be exercised according to an ascertainable objective standard, an exercise of it would appear to amount merely to carrying out the trust according to its terms rather than altering or designating the beneficial enjoyment of the trust property. If the settlor of a trust declares himself trustee of property to pay the income to C for life and the remainder to D and retains power to invade principal to the extent that this is necessary for C's support, this is not a power to alter or designate the enjoyment of the trust property that will attract an estate tax under sections 2038 or 2036, but simply a nondiscretionary power to carry out the trust according to its terms.³⁵ The same reasoning appears to point to the conclusion that the power of the settlor of a trust to demand from the trustee whatever he needs for his support would not be a power to alter or designate the enjoyment of the trust, but would be simply a power to require the trustee to carry out the trust according to its terms.³⁶

There are also serious difficulties in imposing a tax upon a trust where the trustee has power to invade the trust property for the support of the settlor under section 2033, which taxes property owned by the decedent at his death. Section 2033 is limited to taxing inheritable interests that survive the death of the decedent and pass from the decedent to another at his death.³⁷ In the case of a trust where the decedent's interest is limited to payments necessary for his support, it seems obvious that his interest in the trust will cease at his death. Moreover, if the decedent did have a taxable interest under section 2033, it would appear to be an interest incapable of valuation, which would have to be included at zero in his gross estate.³⁸

35. Estate of Robert W. Wier, 17 T.C. 409 (1951); Estate of C. Dudley Wilson, 13 T.C. 869 (1949); *cf.* Estate of Cyrus C. Yawkey, 12 T.C. 1164 (1949).

36. The regulations under the gift tax provide that a power retained by the settlor of a trust to name new beneficiaries or to change the interests of the beneficiaries will make the transfer in trust incomplete and prevent a taxable gift "unless the power is a fiduciary power limited by a fixed or ascertainable standard." Treas. Reg. § 25.2511-2(c) (1958). The power might also be treated as a contingent power that could only be exercised when the settlor needed support. This would eliminate a tax under § 2038 if the settlor was not in need at his death, although it might not prevent a tax under § 2036.

37. LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES § 4.1, at 25 (2d ed. 1962).

38. Estate of Charlotte D. M. Cardeza, 5 T.C. 202 (1945), *aff'd*, 173

Although it is difficult to see how a trust under which the trustee is empowered to invade principal in behalf of the settlor of the trust according to some objective standard is taxable to the settlor's estate under the 1954 Code unless the settlor's interest meets the five per cent requirement for a transfer taking effect at death under section 2037, a district court recently upheld a tax in this situation. In *United States Nat'l Bank v. United States*,³⁹ the decedent during his life created a trust under which the trustees were empowered to pay him up to 5,000 dollars a year from principal in the event of "illness or other emergency." The court held that part of the trust property taxable to decedent's estate that was equal to the actuarial value of his right to the trust property on the assumption that there was a maximum exercise of the power over the settlor's life expectancy. The court cited *Blunt v. Kelly*⁴⁰ without advertent to the fact that a different statutory definition of a transfer taking effect at death was involved in that case. Originally, as the Supreme Court held in *Estate of Spiegel v. Commissioner*,⁴¹ the reversionary interest requisite for a transfer taking effect at death did not have to exceed five per cent of the value of the transferred property. This was true of the statute involved in *Blunt v. Kelly*. It was only after the *Spiegel* case held that retention of an infinitesimal possibility of reverter made a transfer taxable as a transfer taking effect at death that the five per cent requirement was written into the statute.

II. GIFT TAX

Until recently, the cases under the gift tax that involved trusts that could be altered or revoked by one other than the settlor have followed the cases under the estate tax. Where the settlor's only connection with the trust was the hope that the trustee might exercise an unrestricted power to alter or revoke the trust in his favor, it has been held that the transfer was complete and a taxable gift on the theory that the settlor had parted entirely with all interest in the trust property.⁴² Therefore, a power to alter or revoke a trust that is vested in one other than the settlor does not prevent the transfer to the trust from being a complete transfer and a taxable gift.

F.2d 19 (3d Cir. 1949); see LOWNDES & KRAMER, *op. cit. supra* note 37, at 42.

39. 188 F. Supp. 332 (D. Ore. 1960).

40. 131 F.2d 632 (3d Cir. 1942).

41. 335 U. S. 701 (1949).

42. *Herzog v. Commissioner*, 116 F.2d 591 (2d Cir. 1941); *Rheinstrom v. Commissioner*, 105 F.2d 642 (8th Cir. 1939); *Hernstadt v. Hoey*, 47 F. Supp. 874 (S.D.N.Y. 1942); *Minnie E. Deal*, 29 T.C. 730 (1958); *Treas. Reg. § 25.2511-2(b)* (1958).

If the settlor retains power to alter or revoke the trust, the transfer to the trustee is incomplete and is not taxable as a gift⁴³ unless the settlor can only exercise his power with the concurrence of a person possessing an adverse interest in the trust property.⁴⁴ This is true even if the settlor's power to alter the beneficial enjoyment of the trust property does not extend to altering the trust in his own favor.⁴⁵ By what appears to be the sounder and more sophisticated view, a power to alter or revoke a trust that can be exercised by the trustee only with the consent of the settlor of the trust is a power vested jointly in the settlor and the trustee, which prevents a taxable gift unless, of course, the trustee also has a substantial adverse interest in the trust.⁴⁶ Looking realistically at the practical operation of the power, it is a joint power with the trustee rather than a power vested exclusively in the trustee subject to the settlor's veto.⁴⁷ Even though the terms of the trust instrument give a trustee, other than the settlor of the trust, unrestricted discretion about paying over the trust property to the settlor, the transfer to the trust will not be complete for purposes of the gift tax if under the local trust law the settlor's creditors are entitled to reach the trust property.⁴⁸ In substance, the settlor of the trust has a power to revoke the trust by incurring debts; this prevents the transfer to the trustee from being a taxable gift.⁴⁹

If the trustee's power to pay over the trust property to the settlor is limited by an ascertainable objective standard that gives the settlor an equitable claim to the property, it would appear that there would be a complete transfer and a taxable gift if the settlor's interest is not susceptible of valuation. *Robinette v. Helvering*⁵⁰ and the companion case of *Smith v. Shaughnessy*⁵¹ are pertinent in this connection. In the *Shaughnessy* case, the taxpayer transferred property to his 44-year-old wife for life when he was 72 years old. Upon the wife's death, the trust property was to re-

43. *Estate of Sanford v. Commissioner*, 308 U.S. 39 (1939); *Burnet v. Guggenheim*, 288 U.S. 280 (1933).

44. *Camp v. Commissioner*, 195 F.2d 999 (1st Cir. 1952); see LOWNDES & KRAMER, *op. cit. supra* note 37, at 624.

45. *Estate of Sanford v. Commissioner*, 308 U.S. 39 (1939).

46. Cases cited note 11 *supra*. Although all of the cases cited in this note involve the estate tax, they seem equally applicable to the gift tax.

47. See note 12 *supra*.

48. *Alice Spaulding Paolozzi*, 23 T.C. 182 (1954).

49. A good many cases where a discretionary power to revoke a trust vested in a trustee other than the settlor of the trust was held not to prevent a complete transfer and a taxable gift seem to have overlooked the possibility that the creditors of the settlor might compel the trustee to exercise this power in their favor. See cases cited note 26 *supra*.

50. 318 U.S. 184 (1943).

51. 318 U.S. 176 (1943).

vert to the settlor if he was still living and to the wife's testamentary appointees if he was not living; if the wife failed to make an appointment, the trust property would go to her intestate successors under New York law. The Supreme Court held that the value of the settlor's reversionary interest in the trust could be subtracted from the amount of his taxable gifts since it was susceptible of actuarial valuation. In *Robinette*, the taxpayer transferred property in trust, reserving the income from the property to herself for life. If her mother and stepfather survived her, they were to get the income from the trust property during their lives. Upon the death of the last surviving life tenant, the trust property was to go to the issue of the settlor who attained 21, and in default of such issue, to the testamentary appointees of the last surviving life tenant. The Supreme Court refused to let the taxpayer subtract from the taxable gift the value of her possibility of appointing the trust property if she survived her mother and stepfather and was not survived by any issue who attained 21 since it was impossible to value her reversionary interest.

III. RECENT DEVELOPMENTS

It has been generally assumed that the doctrine of the *Robinette* and *Shaughnessy* cases is that the retention of a reversionary interest in connection with the gratuitous transfer of property will not prevent a taxable gift of the full value of the property unless the value of the reversionary interest can be definitely ascertained.⁵² The first case to cast serious doubt on this interpretation was *Estate of Christianna K. Gramm*.⁵³ In that case the taxpayer transferred all of her estate, amounting to approximately 83,000 dollars, to trustees who were directed to pay her the income from the property during her life with remainders over at her death. The trustees were empowered to invade corpus in behalf of the settlor of the trust for her "comfort, education, maintenance and

52. In *Daisy B. Plummer*, 2 T.C. 263 (1943), where the settlor of the trust retained the income from trust for life along with a power to call for principal up to \$15,000 a year, the court held that he had made a taxable gift of the value of the trust property less the value of his life interest and \$15,000 a year principal multiplied by his life expectancy.

The regulations say that if the trustee's power to pay over the trust property to the grantor "is limited by a fixed or ascertainable standard . . . enforceable by or on behalf of the grantor, then the gift is incomplete to the extent of the ascertainable value of any rights thus retained by the grantor." Treas. Reg. § 25.2511-2(b) (1958). The implication from the regulations appears to be that if it is impossible to value the grantor's retained interest in the trust property, there will be a gift of the full value of the property.

53. 17 T.C. 1063 (1951).

support." The Tax Court held that the creation of the trust did not constitute a taxable gift. It was obvious, of course, that the settlor had not made a gift of the income from the trust, which she reserved for her life, but the court held that there had been no gift of the principal of the trust. The reasoning of the case is obscure. The court distinguished the *Herzog* case⁵⁴ (where the existence of a power in the trustee to pay over the trust property to the settlor of the trust was held not to preclude a complete transfer and a taxable gift) on the ground that the trustee's power there was a completely discretionary power that was not limited by any ascertainable objective standard. Even though the settlor in the *Gramm* case had a clearer equitable claim to get the trust property than the settlor did in the *Herzog* case, it is very difficult to reconcile *Gramm* with *Robinette v. Helvering* since it is hard to see how the settlor's possibility of reaching the principal of the trust in the *Gramm* case could be valued with any degree of certainty. After considerable hesitation, the Service seems to have finally accepted the *Gramm* case.⁵⁵ According to Revenue Ruling 54-538,⁵⁶ the amount of the trust in the *Gramm* case, which comprised the taxpayer's entire estate, was so small that there was a probability of substantial invasion of the trust property in behalf of the settlor, which made it unlikely that any beneficiary other than the settlor would ever actually receive the trust property. This prevented the transfer to the trust from being a complete transfer and a taxable gift.

After the decision in the *Gramm* case, the Tax Court decided another case which is perhaps even more difficult to reconcile with the *Robinette* case. In *Sarah Gilkey Vander Weele*,⁵⁷ the taxpayer transferred about 28,000 dollars of her own securities and a remainder worth approximately 565,000 dollars in her grandfather's estate in trust. Under the terms of the trust, the trustees were to pay over the income from the settlor's own securities to the settlor until the remainder in her grandfather's estate vested in possession and the trustees received it from the grandfather's estate. After that, the trustees were authorized to pay the settlor such income from the trust as they should deem desirable

54. *Herzog v. Commissioner*, 116 F.2d 591 (2d Cir. 1941).

55. Originally, the Commissioner acquiesced in the *Gramm* case. 1952-1 CUM. BULL. 2. Later, however, he withdrew his acquiescence. 1957-2 CUM. BULL. 8. Recently, however, the Commissioner changed his mind again and, withdrawing his nonacquiescence, announced that he acquiesced in the *Gramm* case. 1962 INT. REV. BULL. No. 5, at 7; Rev. Rul. 62-13, 1962 INT. REV. BULL. No. 5, at 20.

56. 1954-2 CUM. BULL. 316.

57. 27 T.C. 340 (1956), *aff'd*, 254 F.2d 895 (6th Cir. 1958).

and ample for her "comfortable well-being and enjoyment." There was a further provision in the trust empowering the trustees to invade principal in behalf of the settlor to the extent that they felt that this was necessary to assure her comfortable well-being and enjoyment. The evidence surrounding the creation of the trust showed that the settlor had turned the trust property over to the trustees because she was inexperienced in managing property. Although she created remainders in the trust for her children, her primary concern was to provide for her own comfort and welfare, and the trustees agreed to exercise their discretion in paying the trust property over to her liberally with this end in view. Both the Tax Court and the Circuit Court of Appeals for the Seventh Circuit held that the taxpayer had not made a complete transfer or a taxable gift because of the trustees' power to pay over the trust property to the taxpayer. In its opinion, the Seventh Circuit emphasized the fact that under local trust law, the creditors of the settlor could reach the trust property to the extent that the trustees could pay it over to the settlor. Therefore, she had in substance retained the power to revoke the trust by creating debts. In holding that there was no gift of the income from the trust during the settlor's life, the Tax Court also stressed the right of the settlor's creditors to reach the income from the trust that the trustees could pay to her. But in refusing to find a gift of the principal of the trust, the Tax Court argued that the power vested in the trustees to invade principal in behalf of the settlor prevented the transfer of principal from being complete, declaring that

In view of the fact that petitioner created the trust here in issue for the purpose of providing for her personal financial security and the further fact that the corpus of the trust was subject to an unlimited possibility of withdrawal, we are of the opinion that the execution of the deed of trust on March 25, 1950, and the transfer of assets pursuant thereto did not result in a taxable gift within the meaning of section 1000 of the Internal Revenue Code of 1939.⁵⁸

The fact that the *Vander Weele* case was decided under the 1939 rather than the 1954 Code is not significant since the question of whether there was a complete transfer and a taxable gift is the same under either statute.

In Revenue Ruling 62-13,⁵⁹ the Service acquiesced in the *Vander Weele* case on the ground that

[W]here property is transferred to a trust under the terms of which the trustee is given very broad discretionary powers over the distribu-

58. *Id.* at 346.

59. 1962 INT. REV. BULL. No. 5, at 20. Before this ruling, which

tion to the grantor of income and corpus, and where, even though the value of the property transferred is large in amount, under the circumstances there appears to be no assurance at the time of creating the trust that anything of value will be paid to a beneficiary (or class of beneficiaries) other than the grantor, such transfer constitutes, for purposes of the federal gift tax statute, an incomplete transfer and, hence, does not result in a taxable gift.⁶⁰

It should be noted that in acquiescing in the *Vander Weele* case the Service did not refer to the fact that under local law the settlor's creditors could reach the trust property. Apparently, the ruling attempts to get away from local trust law and establish a uniform rule: any transfer under which the trustee's powers to pay over trust property to the settlor makes it uncertain whether any other beneficiary will ever receive the trust property is an incomplete transfer which will not be regarded as a taxable gift under the gift tax.

It is not entirely clear just what Revenue Ruling 62-13 meant in stating that there would not be a taxable gift where "under the circumstances there appears to be no assurance" that beneficiaries other than the settlor of the trust will take the trust property. Are the circumstances to which the ruling refers the fact that the trustees have an unlimited discretion in paying over the trust property to the settlor of the trust, so that the mere existence of such a power prevents a taxable gift? Or are the "circumstances" referred to extrinsic evidence (like the evidence in the *Vander Weele* case of the understanding that the trustees would exercise their discretion liberally in favor of the settlor of the trust) that makes it improbable that anyone other than the settlor of the trust will ever actually receive the trust property? It seems obvious that if the completeness of a transfer cannot be determined from the terms of the transfer, but instead involves a search into the extrinsic evidence surrounding the transfer, ascertaining the existence of a taxable gift is going to be drawn into considerable confusion and uncertainty.

The major difficulty with the Treasury's interpretation of the *Vander Weele* case in Revenue Ruling 62-13 is reconciling it with the Supreme Court's decision in *Robinette v. Helvering*,⁶¹ where the Court held that a possibility of the settlor regaining property transferred to a trust cannot be deducted from the settlor's taxable gifts unless the possibility is susceptible of valuation.

acquiesces in the *Vander Weele* case, the Commissioner had refused to accept that decision. 1957-2 CUM. BULL. 8.

60. Rev. Rul. 62-13, 1962 INT. REV. BULL. No. 5, at 21.

61. 318 U.S. 184 (1943).

Since the settlor's chance of regaining the trust property in the *Vander Weele* case was obviously impossible to value, it would appear that she made a gift of the trust property. Revenue Ruling 62-13 distinguishes the *Robinette* case in a fashion which is more of a credit to verbal agility than a constructive contribution to the predictability of the tax law in this area. According to the ruling, the *Robinette* case only applies where "it has already been determined that a gift has been made and the issue concerns the valuation of an interest retained by the donor."⁶² This sounds as though it has more meaning than it actually does. In all of the cases where a donor retains an interest in transferred property there has been a formal transfer, and the only way to determine whether there has been a taxable gift is by considering the possibility of valuing the settlor's retained interest. In the *Vander Weele* case, for example, the settlor created remainders in the trust property for her children that looked just as much like a gift as the remainders that the settlor in the *Robinette* case gave to the testamentary appointees of her mother or stepfather. The only practical way of determining the extent to which the remainders in either case were given away for purposes of the gift tax is the possibility of valuing the donor's reversionary interest.

As far as clarifying the law is concerned, the Treasury could have done a better job in Revenue Ruling 62-13 if it had limited the *Vander Weele* case to a discretionary trust that was revocable because the settlor's creditors possessed power to reach the trust property under local trust law. Not only is it very hard to reconcile the Treasury's interpretation of the *Vander Weele* case with the Supreme Court's decision in *Robinette v. Helvering*, but it is difficult to tell just what the Treasury's position on the *Vander Weele* case actually is since the ruling declares that there will be an incomplete transfer, which will not be taxed under the gift tax, where there is a transfer in trust and "under the circumstances there appears to be no assurance at the time of creating the trust that anything of value will be paid to a beneficiary (or class of beneficiaries) other than the grantor." The ruling does not make it clear whether the "circumstances" which prevent the transfer from being complete are the mere existence of the uncontrolled power in the trustee to invade the trust property in behalf of the settlor or extrinsic evidence indicating a probability that the power will be exercised in favor of the settlor.

A comparison of *Minnie E. Deal*⁶³ with the decision of the *Vander Weele* case illustrates the uncertainty in this area. In the

62. 1962 INT. REV. BULL. No. 5, at 22.

63. 29 T.C. 730 (1958).

Deal case, the taxpayer transferred land worth 66,000 dollars to her three sons-in-law in trust to pay to her whatever income from the property they felt, in their discretion, that she required for her reasonable needs and to accumulate the balance until her death, when the trust property was to be distributed to the settlor's four daughters. The Tax Court held, despite the manifest possibility that none of the income from the trust might actually be paid to the remaindermen, that there was a gift of the full value of the trust property: "Accordingly, we hold, if for no other reason than a failure of proof, that the value of the remainder interest conveyed in trust for the benefit of petitioner's four daughters was \$66,000 as determined by the respondent."⁶⁴ The *Deal* case was decided after the *Vander Weele* case. It looks like a simple application of the *Robinette* case: the retention of an interest in property by the donor of the property will not prevent a taxable gift of the full value of the property unless the donor proves the value of the retained interest. If this is true, then how can the *Gramm* and *Vander Weele* cases be reconciled with the decision in *Robinette v. Helvering*?

Perhaps the principal merit of the Treasury approach to the *Gramm* and *Vander Weele* cases is that it may force a reappraisal of the decisions which have held that a trust that can be altered or revoked by one other than the settlor of the trust is a complete transfer, which is taxable under the gift tax rather than the estate tax. As a matter of sound tax policy, it seems clear that such a trust should be treated as an incomplete transfer, which is taxable under the estate tax rather than the gift tax. Normally, the only reason why the creator of a trust would vest power in the trustee to alter or revoke the trust, rather than retaining the power himself, would be to keep control over the trust property during his life without subjecting the property to the estate tax at his death. The proper way to deal with this situation is to tax the trust under the estate tax rather than the gift tax. Furthermore, it is ridiculous to tax a trust that the settlor cannot revoke without the consent of a person possessing a substantial adverse interest in the trust under the estate tax and to exempt a trust that can be revoked by a nonadverse person alone.

If the Treasury is going to take the position that a transfer to a trust is an incomplete transfer that is not taxable under the gift tax if the trustee, other than the settlor, is given a broad discretionary power to alter or revoke the trust, then it would seem that it will be compelled to contend that the transfer in trust is also incomplete and taxable under the estate tax. Although the es-

64. *Id.* at 735.

tate and gift taxes are not correlated to the extent that they are mutually exclusive so that a transfer which is taxable under one tax is not taxable under the other, it seems clear that they were intended to be mutually inclusive in the sense that a transfer which escapes one tax must be caught under the other.⁶⁵ The recent ruling of the Internal Revenue Service treating a transfer to a trust under which the trustee has power to alter or revoke the trust as an incomplete transfer, which is not taxable under the gift tax,⁶⁶ suggests that the next step which the Service must take will be to contend that this type of trust is taxable under the estate tax. If the Service succeeds in taking this step, it will, of course, put an end to avoidance of an estate tax by means of a transfer to an inter vivos trust under which one other than the settlor of the trust is given power to alter or revoke the trust.

Although there is authority to the effect that a transfer to a trust that can be altered or revoked by one other than the settlor of the trust is a complete transfer, which is not taxable under the estate tax,⁶⁷ it is far from clear that this is an inevitable construction of the Code. It is true that literally sections 2038 and 2036 limit the tax to situations where the settlor of a trust possesses a taxable power over the trust property that he can exercise either alone or in conjunction with another person. It would not require an insuperable feat of construction, however, to identify a non-adverse person with the settlor of the trust and to attribute the power to alter or revoke the trust to the settlor on the theory that the nonadverse holder of the power is his alter ego or agent. It is true that this construction departs from the literal language of the statute. There are, however, substantial considerations of tax policy which might justify such an equitable, rather than a literal, construction of the Code.

If a person creates a trust and gives someone else, like the trustee, power to alter the trust, but provides that this power cannot be exercised in favor of the settlor himself, there is a complete transfer which is taxable as a gift.⁶⁸ Presumably, under the existing decisions it is also a complete inter vivos transfer which is not taxable under the estate tax. Since in this situation the creator of the trust cannot recover the trust property, there is less reason to tax the transfer under the estate tax than there is to tax a transfer which can be revoked by the trustee so that the settlor of the trust

65. See LOWNDES & KRAMER, *op. cit. supra* note 37, at 614-15.

66. Rev. Rul. 62-13, 1962 INT. REV. BULL. No. 5, at 20.

67. See notes 2-8 *supra* and accompanying text.

68. *Higgins v. Commissioner*, 129 F.2d 237 (1st Cir. 1942); *Joseph Goldstein*, 37 T.C. 897 (1962).

property may regain the trust property. It is well settled, however, that a trust which can be altered by the settlor of the trust, although it cannot be altered in his own favor, is taxable under the estate tax⁶⁹ and is not taxable under the gift tax.⁷⁰ If the power of a nonadverse person to revoke a trust is to be attributed to the settlor of the trust in order to tax the trust property to his estate, then the power of a nonadverse person to alter the trust, which does not extend to revoking the trust or returning the trust property to the settlor, should probably also be attributed to the settlor.

If a completely discretionary power to alter or revoke a trust that is vested in one other than the settlor of the trust will result in taxing the trust property to the settlor's estate, it would seem that a power to pay over the trust property to the settlor that is subject to an ascertainable objective standard should also result in taxing the trust property to the settlor's estate. But if it can be established that there is virtually no chance that the trust property will be returned to the settlor because of the limitations on the power and the circumstances of the particular situation, then the trust property should not be taxed to the settlor's estate. If, moreover, the maximum amount that might be paid over to the settlor under the power can be ascertained, then the estate tax should be limited to this amount.

Although there does not seem to be any direct authority for this result, there are persuasive analogies. In *Clement v. Smith*,⁷¹ a man transferred property to his father and a trust company as trustees to accumulate the income from the trust property during the settlor's life, retaining control over the remainder in the property after his death. The trust provided that the trustees could pay over any income that they saw fit to the settlor's father for his maintenance and support during the settlor's life. The father was independently wealthy so there was virtually no chance that the trustees would ever be able to pay him any of the trust income under a power limited to his maintenance and support. Consequently, the court held that the settlor had not transferred any part of the trust property or made a taxable gift. *Clement v. Smith* relied upon *McHugh v. United States*,⁷² where a woman transferred preferred stock worth 24,350 dollars to a trust company for her sister-in-law with directions to pay the income from the trust to the sister-in-law for ten years or until her death. The trustee was also authorized to pay over any principal that it deemed

69. *Porter v. Commissioner*, 288 U.S. 436 (1933).

70. *Estate of Sanford v. Commissioner*, 308 U.S. 39 (1939).

71. 167 F. Supp. 369 (E.D. Pa. 1958).

72. 142 F. Supp. 927 (Ct. Cl. 1956).

desirable to meet the "essential needs" of the sister-in-law if her other funds were insufficient for this purpose. The Commissioner imposed a gift tax on the full value of the stock transferred to the trustee on the ground that due to the power of invasion all of the trust property might be paid over to the sister-in-law. The court held, however, that in view of the sister-in-law's financial circumstances there was virtually no possibility that the principal of the trust could be invaded under a power that was limited to her essential needs and that there was no gift of principal. These cases followed the decisions holding that a remainder to charity will not be deductible if there is a possibility of diverting the property from the charity unless the power of invading the trust property is limited by an ascertainable standard,⁷³ which under the circumstances of the case, makes it virtually impossible that any diversion will actually occur.

Of course, the *Clement* and *McHugh* cases raised the question of whether there was a taxable gift of property that one other than the donor was empowered to pay over to the donee; they held that if the power was so limited that under the circumstances of the case there was virtually no chance of its exercise, there would not be a gift. The immediate question is whether a power to pay over property to the settlor of a trust that is vested in one other than the settlor will prevent a taxable gift if the power is subject to objective limitations that make it virtually impossible for any payment to be made to the settlor under the specific circumstances. It seems plain, however, that if the impossibility of exercising a power to transfer property to one other than the donor of the property prevents a taxable gift, the inability to exercise a power to return property to a donor justifies disregarding the power for tax purposes and treating the transfer by the donor as a complete transfer and a taxable gift. By the same token, no property should be included in the settlor's estate under the estate tax that is beyond the settlor's range of effective recall by virtue of the fact that there is virtually no chance that a power to return the property to the settlor can be exercised due to the limitations on the power and the circumstances of the particular situation.

CONCLUSION

It seems clear that as a matter of sound tax policy a man should not be allowed to escape the estate tax upon property over which

73. *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595 (1949); *Merchants Nat'l Bank v. Commissioner*, 320 U.S. 256 (1943); *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929).

he retains effective control during his life. A trust under which the trustee of the trust has complete discretion over altering or revoking the trust should be taxed under the estate tax rather than the gift tax. There are decisions that hold that such trusts represent complete transfers, which fall under the gift tax rather than the estate tax, at least if under local law the trustee has complete discretion about paying over the trust property to the settlor of the trust, and cannot be compelled to pay anything that he might pay to the settlor to the settlor's creditors. The Treasury's recent acquiescence in the *Vander Weele* case, which treats a transfer to a trust that can be altered or revoked by one other than the settlor of the trust as an incomplete transfer which is not taxable under the gift tax, appears to compel a reappraisal of the cases that treat such trusts as complete transfers which are not taxable under the estate tax. Until this reappraisal has taken place or has been definitely abandoned, one who creates a trust under which a person other than the settlor is given power to alter or revoke the trust in the expectation of avoiding the estate tax without losing control over the trust property should anticipate that he may be disappointed.